

<sup>2</sup> The Board notes that following the September 10, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his schedule award claim.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 17, 2020 appellant, then a 40-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he developed neck, arm, and knee injuries due to factors of his federal employment, including loading and unloading trucks. He noted that he first became aware of his condition and realized its relation to his federal employment on April 3, 2010. OWCP accepted the claim for lesion of the left ulnar nerve, neck sprain, bilateral knee derangement, displacement of cervical intervertebral discs without myelopathy and brachial neuritis or radiculitis, and cervicgia. Appellant stopped work on May 8, 2010 and has not returned. OWCP initially paid appellant wage-loss compensation and medical benefits on the supplemental rolls and later paid appellant on the periodic rolls commencing December 19, 2010.<sup>4</sup>

By decision dated July 16, 2014, OWCP terminated appellant's compensation benefits and entitlement to a schedule award, effective July 16, 2014, pursuant to 5 U.S.C. § 8106(c)(2) for refusal of suitable work.

Appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review on August 11, 2014. The hearing was held on March 18, 2015. By decision dated June 3, 2015, the hearing representative affirmed the July 16, 2014 suitable work termination.

On June 30, 2015 appellant filed a timely appeal to the Board. The Board affirmed the June 3, 2015 hearing representative's decision on December 24, 2015, finding that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and schedule award benefits effective July 16, 2014 pursuant to 5 U.S.C. § 8106(c)(2).<sup>5</sup>

Appellant subsequently submitted multiple requests for reconsideration. By decisions dated April 7, August 12, and November 18, 2016, OWCP denied appellant's requests for reconsideration without conducting a merit review.

On January 4, 2017 appellant, through counsel, filed a timely appeal to the Board. By decision dated July 21, 2017, the Board affirmed OWCP's August 12 and November 18, 2016

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<sup>3</sup> Docket No. 15-1494 (issued December 24, 2015); Docket No. 17-0503 (issued July 21, 2017).

<sup>4</sup> On June 25, 2010 appellant underwent left cubital tunnel surgery. On May 28, 2013 he underwent C4-6 anterior microdiscectomy and interbody fusion surgery.

<sup>5</sup> Docket No. 15-1494 (issued December 24, 2015).

decisions. The Board found that OWCP properly determined that appellant's requests for reconsideration were insufficient to warrant merit review of the claim under 5 U.S.C. § 8128(a).<sup>6</sup>

On February 23, 2018 appellant filed a claim for a schedule award (Form CA-7). OWCP received medical evidence in support thereof.

By decision dated August 9, 2018, OWCP denied appellant's claim for a schedule award. It found that he had not submitted any medical evidence which supported that he had reached maximum medical improvement (MMI) and that he had sustained a permanent measurable impairment of a scheduled member or function of the body, pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>7</sup>

On September 4, 2018 appellant requested reconsideration and submitted additional medical evidence. In a report dated August 24, 2018, Dr. Hrair E. Darakjian, a Board-certified orthopedic surgeon, related that appellant's condition was permanent and stationary, and that appellant had reached MMI.

In a September 25, 2018 letter, the employing establishment challenged appellant's schedule award claim. It noted that the Board previously found that OWCP had properly terminated appellant's wage-loss compensation and entitlement to schedule award benefits effective July 16, 2014 in accordance with 5 U.S.C. § 8106(c)(2).

By decision dated December 3, 2018, OWCP denied modification of its August 9, 2018 decision.

OWCP subsequently received additional medical evidence including progress reports from Dr. Darakjian dated August 24, September 25, October 9, November 20, and December 18, 2018 and January 15, February 12, April 9, and May 7, 2019.

In a January 28, 2019 report, Dr. Mark Bernhard, an osteopath and physical medicine and rehabilitation specialist, noted appellant's history of injury, reviewed medical reports and noted his examination findings. He diagnosed lesion of left ulnar nerve, neck sprain, bilateral derangement of knees, left limb pain, displacement of cervical intervertebral disc without myelopathy, brachial neuritis or radiculitis, not otherwise specified, and cervicgia. Dr. Bernhard opined that appellant reached MMI as of January 28, 2019. He indicated that additional diagnostic studies were needed in order to render an impairment rating under the A.M.A., *Guides*. Appellant underwent additional diagnostic studies.<sup>8</sup>

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<sup>6</sup> Docket No. 17-0503 (issued July 21, 2017).

<sup>7</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>8</sup> A March 12, 2019 x-ray of right knee revealed no evidence of fracture or malalignment; a March 12, 2019 x-ray of left knee also revealed no abnormalities. A March 18, 2019 electromyogram (EMG) and nerve conduction velocity (NCV) studies were positive for bilateral carpal tunnel syndrome. The March 18, 2019 ulnar nerve conduction study was normal.

In an April 29, 2019 supplemental report, Dr. Bernhard reviewed the diagnostic testing. He reiterated that appellant reached MMI on January 28, 2019. Using the A.M.A., *Guides* and *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*), Dr. Bernhard provided impairment calculations. He opined that appellant had 15 percent left and 15 percent right upper extremity impairment for the cervical spine at C3-4 and C5-6 levels for sensory and motor deficits; 2 percent impairment for right carpal tunnel syndrome and 2 percent impairment for left carpal tunnel syndrome; and no impairment for left cubital tunnel syndrome or for bilateral knee conditions.

On June 10, 2019 appellant requested reconsideration. Additional progress reports from Dr. Darakjian regarding appellant's current medical status dated June 4 and July 30, 2019 were received.

By decision dated September 10, 2019, OWCP denied appellant's request for reconsideration. It found that it had erroneously issued the August 9 and December 3, 2018 decisions with additional appeal rights. OWCP further found that appellant's entitlement to compensation benefits, including schedule award benefits, was terminated by the July 16, 2014 § 8106(c) sanction decision, and the medical evidence appellant submitted from Drs. Darakjian and Bernhard were irrelevant to the underlying issue.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right. OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>9</sup>

One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>10</sup> A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>11</sup> When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>12</sup> In support of a request for reconsideration, a claimant is not required to submit all evidence which may be

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<sup>9</sup> 20 C.F.R. § 10.607.

<sup>10</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>11</sup> *Id.* at § 10.606(b)(3).

<sup>12</sup> *Id.* at § 10.608(a), (b).

necessary to discharge his or her burden of proof.<sup>13</sup> He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.<sup>14</sup> When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's request for reconsideration and any evidence submitted in support thereof.<sup>15</sup>

OWCP regulations provide that in a termination under section 8106(c) of FECA, a claimant has no further entitlement to compensation under sections 8105, 8106, and 8107 of FECA which includes payment of continuing compensation for permanent impairment of a scheduled member.<sup>16</sup> The Board has found that a refusal to accept suitable work constitutes a bar to receipt of a schedule award for any impairment which may be related to the accepted employment injury.<sup>17</sup>

Chapter 2.808.12 of OWCP's procedures discusses schedule awards and refusal of suitable work.<sup>18</sup> It indicates, "Section 5 U.S.C. 8106(c) provides a penalty against employees who refuse offers of suitable employment, or who abandon suitable work without good cause. If a claimant refuses to accept a suitable offer of employment, the [claims examiner] should follow the sanction procedures as discussed in FECA PM 2.0814. Once a § 8106(c) sanction decision has been issued, the claimant has no ongoing entitlement to compensation for continuing [temporary total disability] TTD or schedule award payments."

However, the commencement of the schedule award begins on the date of MMI. If MMI was obtained prior to invoking the section 8106(c) sanction, then the claimant would be entitled to schedule award payments from the date of MMI through the date of the section 8106(c) sanction decision.<sup>19</sup> Claims for schedule award received after the date of the section 8106(c) sanction

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<sup>13</sup> See *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *P.L.*, Docket No. 18-1145 (issued January 4, 2019); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>14</sup> *S.S.*, Docket No. 18-0647 (issued October 15, 2018).

<sup>15</sup> *P.L.*, *supra* note 13; *Annette Louise*, 54 ECAB 783 (2003).

<sup>16</sup> See 20 C.F.R. § 10.517.

<sup>17</sup> *K.H.*, Docket No. 07-2022 (issued February 25, 2008); *Stephen R. Lubin*, 43 ECAB 564 (1992).

<sup>18</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.12 (February 2013).

<sup>19</sup> See *K.H.*, Docket No. 07-2022 (issued February 25, 2008) (The Board held that OWCP properly denied appellant's entitlement to schedule award compensation as section 8106(c) of FECA served as a bar to further compensation for disability arising from the accepted employment injuries); *Alfred R. Anderson*, 54 ECAB 179 (2002); *Stephen R. Lubin*, 43 ECAB 564 (1992) (where the Board found that the penalty provision of section 8106(c) may serve as a bar to compensation pursuant to appellant's claim for a schedule award for the period after the termination of compensation based on a refusal to accept a suitable offer of employment).

decision should not be adjudicated such that new appeal rights are afforded. Rather, the CE should refer the claimant to the appeal rights provided with the original sanction decision.<sup>20</sup>

### **ANALYSIS**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his schedule award claim.

Appellant filed his claim for a schedule award on February 23, 2018, almost four years after OWCP's July 16, 2014 decision, which terminated his wage-loss compensation and entitlement to schedule award benefits pursuant to 5 U.S.C. § 8106(c)(2) because he refused suitable work. Under OWCP's procedures, no claims for a schedule award received after the date of the section 8106(c) sanction decision should be adjudicated with new appeal rights afforded.<sup>21</sup> Thus, OWCP properly found that it had erroneously issued its August 9 and December 3, 2018 schedule award decisions.

As appellant was not entitled to appeal rights from the decisions denying his schedule award claim, the Board finds that OWCP properly denied appellant's request for reconsideration.

### **CONCLUSION**

The Board finds OWCP properly denied appellant's request for reconsideration of the merits of his schedule award claim.

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<sup>20</sup> See *supra* note 18.

<sup>21</sup> See *id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 10, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 4, 2020  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board